Paper No. 19

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Ex parte KEITH M. BETZEN

Appeal No. 2003-0930
Application No. 09/550,555

ON BRIEF

Before ABRAMS, STAAB, and NASE, Administrative Patent Judges.
NASE, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 3 and 4, which are all of the claims pending in this application.

We REVERSE.

BACKGROUND

The appellant's invention relates to shock-producing, animal repelling and training devices; particularly to a portable, wireless, shock-producing, animal repelling and training device which has the crisscrossing electrodes maintained in position by an electrode separator (specification, p. 1). A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

Claims 3 and 4 stand rejected under the judicially created doctrine of double patenting over claims 1 to 5 of U.S. Patent No. 6,014,951[1] to Betzen in view of U.S. Patent No. 4,580,767[2] to Zimmerman.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejection, we make reference to the final rejection (Paper No. 9, mailed February 7, 2002) and the answer (Paper No. 15, mailed September 27, 2002) for the examiner's complete reasoning in support of the rejection, and to the brief (Paper No. 13, filed May 7, 2002) for the appellant's arguments thereagainst.

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[1] Issued January 18, 2000.

[2] Issued April 8, 1986.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the Betzen and Zimmerman patents, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Claim 3 under appeal is drawn to a shock-producing, animal repelling and training device similar to the deer repellent device set forth in claim 1 of the Betzen patent. Claim 4 under appeal is drawn to a method of repelling and training target animals similar to the method of repelling deer set forth in claim 5 of the Betzen patent. However, unlike claims 1 and 5 of the Betzen patent, claims 3 and 4 under appeal additionally recite an electrode separator to hold the crisscrossing electrodes in place while preventing contact between the electrodes, while allowing full exposure of the electrodes to the target animal whereby the crisscrossing electrodes are held in position by the electrode separator while being insulated from each other.

To account for this difference in the rejection before us in this appeal, the examiner (final rejection, pp. 2-3) relies upon the patent to Zimmerman. Zimmerman discloses an insulator for supporting an electric wire on a fence post having an improved design to prevent the insulator from slipping out from under a staple used to

secure the insulator on the fence post. From this teaching of Zimmerman, the examiner concludes that it would have been obvious to one of ordinary skill in the art at the time the invention was made to insulate the electrodes of Betzen from each other. We do not agree.

In our view, Zimmerman provides no teaching, suggestion or motivation to have provided the electrodes of Betzen with an electrode separator to hold the crisscrossing electrodes in place while preventing contact between the electrodes. In that regard, Zimmerman's insulator is for supporting an electric wire on a fence post, not for preventing contact between crisscrossing electrodes. Accordingly, we must conclude that the rejection under appeal stems from hindsight knowledge derived from the appellant's own disclosure. The use of such hindsight knowledge is, of course, impermissible.[3]

For the reasons set forth above, the decision of the examiner to reject claims 3 and 4 under the judicially created doctrine of double patenting is reversed.

[3] See, for example, W. L. Gore and Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1553, 220 USPQ 303, 312-13 (Fed. Cir. 1983), cert. denied, 469 U.S. 851 (1984).

CONCLUSION

To summarize, the decision of the examiner to reject claims 3 and 4 under the judicially created doctrine of double patenting is reversed.

REVERSED

NEAL E. ABRAMS Administrative Patent Judge	)	
LAWRENCE J. STAAB Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
JEFFREY V. NASE Administrative Patent Judge	)	

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